Supreme Court, U.S.
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Nos. 95-1455 & 95-1508

In The

Supreme Court of the United States

October Term, 1995

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES,

Appellant,

and

GEORGE PRICE, ET AL.,

Appellants,

v.

BOSSIER PARISH SCHOOL BOARD,

Appellee.

On Appeal From The United States District Court For The District Of Columbia

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Whether the Trial Court was correct in holding that evidence of alleged violations of Section 2 of the Voting Rights Act cannot be used to deny preclearance under Section 5 of the Voting Rights Act.

2. Whether the Trial Court was correct in its findings of fact that the Bossier Parish School Board redistricting plan was adopted without discriminatory purposes.

3. Whether the Trial Court correctly precleared the Bossier Parish School Board redistricting plan.

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APPELLEE'S MOTION FOR DISMISSAL OF APPELLANTS' APPEAL AND/OR AFFIRMATION OF THE JUDGMENT OF THE TRIAL COURT

Appellee respectfully requests that the Court deny the appeals of Appellants Janet Reno, Attorney General of the United States and George Price et al. from the judgment of the United States District Court for the District of Columbia. The Trial Court opinion is reported at 907 F.Supp. 434. (For the convenience of the Court, all citations to the Trial Court opinion will be to the opinion as reproduced in the Appendix attached to the Jurisdictional Statement filed by Appellant, Janet Reno, Attorney General of the United States.) Because the Jurisdictional Statements of both appellants are substantially the same and are based on the same set of facts, this response is directed at both appeals. In this response, we will identify the appeals by designation of the particular appellant.

STATEMENT OF THE CASE

This case should never have been litigated. That it is now posited in the United States Supreme Court emphasizes the wreckage that is so often wrought by the exercise of virtually unlimited authority coupled with an unbridled penchant for social engineering. It illustrates beyond peradventure the danger of zeal untempered by judgment, the quick fix without thought to long term, unsavory political consequences.

In 1991, the Bossier Parish Police Jury, the governing body of the parish, redistricted. The Jury consists of twelve members elected from single member districts. In 1991, eleven members were white, one black. The redistricting plan was unanimously approved by the Jury and

submitted to the Justice Department. After arranging for the relocation of several polling stations, the Justice Department blessed the effort and granted preclearance. (Trial Court Opinion at pp. 3a, 4a.)

Bossier Parish has a population of 86,088 of whom 20.1 per cent are black. Blacks comprise 17.6 per cent of the voting population and 15.5 per cent of the registered voters. Bossier City, the largest city in the parish, has a population of 52,721 of whom 17.95 per cent are black. The remaining black population is scattered throughout the parish in Benton, Plain Dealing, Princeton and Haughton.[1] (Trial Court Opinion at p. 2a.)

Because the concentrations of black residences are so scattered, the Police Jury's cartographer was unable to draw any black-majority districts that were contiguous and compact. (See Complainant's Exhibit No. 17 at pp. 2-6.) After the 1980 census, twelve districts with white majorities had been drawn. Nonetheless, Mr. Jerome Darby, a black, had won two terms, each time in runoffs against a white candidate. After preclearance of its new plan, Mr. Darby ran unopposed. (Trial Court Opinion at p. 2a.)

The Bossier Parish School Board began its redistricting in 1991. There was no emergency because the next school board elections were not scheduled until the fall of 1994. Mr. Gary Joiner, the cartographer who had assisted the Police Jury, was hired by the School Board. He set about his task by discussing with Board members their

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[1] The Justice Department's Jurisdictional Statement states that black residences are concentrated in two areas. Not so. The Trial Court opinion at page 2a has the accurate picture.

preferences.[2] In September, 1991, Board member Thomas Myrick suggested that because the Police Jury and the School Board were the same size, the School Board should simply adopt the Jury plan. His suggestion, although not immediately acted on, planted a seed that matured a year later.

ARGUMENT

I. Adoption of the Police Jury Plan Was Not Racially Motivated

The Trial Court had no difficulty in divining the reasons the School Board adopted the Police Jury plan. The Trial Court found as fact that the motives were not discriminatory. (See Trial Court Opinion at 27a *et seq.*) Two paramount reasons were emphasized by the Court:

1. The Jury plan offered "guaranteed preclearance."

2. The Jury plan offered "easy implementation."

The Trial Court could have added that adopting the Jury plan was less expensive than fashioning a new plan, was a suitable compromise to competing appetencies advanced by the members, would terminate a matter that threatened to divert attention from educational considerations, and obeyed Louisiana electoral law in that it did not require the splitting of existing precincts.[3] In essence,

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[2] Joiner testified that in addition to the usual concerns of incumbents, school board members identify with schools in their districts and try to hold on to them.

[3] The Trial Court had difficulty dealing with the Louisiana Statute that prohibited the splitting of any existing precincts whatever if the Police Jury and the School Board of a parish

the Trial Court found as fact that the School Board presented a *prima facie* case for preclearance. It did not believe that Appellants' rebuttals were sufficient to tip the balance in their favor. (Trial Court Opinion at p. 27a-30a.) The Trial Court rejected the allegations that the Board did not want a black member by pointing out that the Board during the period when it was considering a plan, appointed Mr. Jerome Blunt, a black, to fill a Board vacancy.

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were the same size. See La. Rev. Stat., Title 17, Sec. 71.3E. No one ever alleged that this statute was unconstitutional; had it been so challenged, the Trial Court would have been obligated to invite the Louisiana Attorney General into the suit to defend the statute. The Louisiana prohibition against splitting precincts has no racial overtones. It is based merely on the happy assumption that when the Justice Department preclears a police jury plan on Monday, it will not repudiate its action on Friday. To be sure, some precincts are split with the permission of the Police Juries in matters of this kind, but we are chary of asserting that a Police Jury can violate state law at its whim. Perhaps, a federal court can give a plan splitting precincts its blessing and cure the violation (and again we doubt that a federal court can order violation of a state law without an allegation that the law is unconstitutional), but when the School Board was reviewing its options, its attorney and cartographer both told the Board that splitting precincts was not an option. (Tr. Vol. I. pp. 488, 49, 108, 109, 143, 148.) In any case, the Trial Court found that the NAACP plan advanced at the time split some forty-six precincts, a ridiculous and unprecedented number. But this is sophisticated and slightly convoluted legal reasoning, far beyond the province of the average Board member.

II. The Conduct of the Justice Department

From the beginning, Justice Department personnel along with intervenors were persuaded that Bossier Parish is a cesspool of racial bigotry, a bit of stereotyping that would be denounced with strident indignation if applied to any ethnic or racial minority.[4] This was the predisposition of the Justice Department before any evidence was taken; thereafter, they combed through the evidence in a frantic search for something, just anything, to sustain their predilections. In negotiations prior to this suit, the personnel were stern and unyielding. They made it abundantly clear that nothing less than two black-majority districts would support a preclearance; they also let it be known that they did not care how bizarre the districts appeared, how unsound demographically they were, or how many Louisiana statutes would be violated in the process. One black-majority district would not suffice.

Of course, political entities can always seek justice by filing for a declaratory judgment in the United States District Court in the District of Columbia. Except that few can. Many small entities cannot afford the luxury of resistance which Justice Department personnel warn them will be cost prohibitive. Most of these political entities are represented by district attorneys who are chronically overworked and understaffed, have no knowledge of the Voting Rights Act, have not the time to

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[4] The most pernicious phrase tossed about by the Justice Department involves the right of blacks to elect candidates of their choice, as though it is inconceivable that a black should vote for a white or a white for a black, without regard to the experience of the candidate, his political agenda, and his political appeal.

study it, are largely skilled in criminal law only, and, in short, do not have the resources to counter the inexhaustible funds and live bodies the Justice Department can hurl against them.[5] They are less than thrilled at litigating in a strange court with unfamiliar rules. And, of course, before *Shaw v. Reno*, 113 S.Ct. 2816 (1993) and *Miller v. Johnson*, 115 S.Ct. 2475 (1995), there was every reason to believe that litigating the matter was the proverbial exercise in futility. Entity after entity in Louisiana collapsed, indignation turning to mush, under the pressures exerted by the relentless personnel of the Justice Department. The Bossier School Board alone in Louisiana dared the government and braved the costly litigation in the District of Columbia, not because its membership was racist, but because its cause was just. There is something to be said for sacrifice in pursuit of principle, old-fashioned and trite as it may sound. The determination of a free people to seek justice and to retain control of its electoral system, a precious democratic heritage, should not be confused with racism. It is shameful for Appellants to stereotype the Board members as racists because they are white;

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[5] The Justice Department descended on Bossier Parish in platoon strength. They pored through every record the School Board had and demanded copies of things that were not even remotely relevant. They brought these records to court in a device not unlike the carts used by hotels to tote around baggage. They flew to Washington eight witnesses, three opinion witnesses and a cartographer. At times arrayed against the Board were upwards of a dozen attorneys and support personnel. Supplying what the Justice Department demanded was a full time job. Counsels for the Board felt they could not tax the School Board's resources beyond taking to Washington two board members, the cartographer and the school superintendent. If the United States operates at a fiscal deficit, no one has bothered to tell Justice Department personnel about.

were we to stereotype blacks or other ethnic minorities in the same manner, we would immediately be showered with charges of racism and discrimination. The sad fact is that despite recent Supreme Court and lower courts' opinions, political entities will probably still be bully-ragged and dragooned by the Voting Rights Section of the Justice Department who continue to insist, like Robespierre, that they have a monopoly on virtue.[6]

III. The Trial Court Was Correct in Holding that a Violation of Section 2 Should Not Be the Basis for Denying Preclearance under Section 5.

The Appellant Justice Department in its Jurisdictional Statement argues that alleged violations of Section 2 of the Voting Rights Act should be cause to deny preclearance to a jurisdiction under Section 5 of the Voting Rights Act.

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[6] Lest we be misunderstood, we do not believe that the Voting Rights Act was a mistake. It was needed to correct abuses that had too long persisted. It certainly met the needs and circumstances of the day. We cannot say the same for the distortions of the Act for which the Justice Department is responsible. Even today, we would not dismantle the Act. We would amend it so that preclearances could also be granted by local three-judge federal courts, whose judges take the same oath of office as District of Columbia judges, and have been entrusted with integrating the school system, handling civil cases involving discrimination, handling Section 2 cases under the Voting Rights Act, and presumably have as much integrity and knowledge as federal judges in other parts of the country. It would make it less costly for political entities to seek justice and have their rights vindicated. Mr. Justice Holmes was quite correct when he spoke of rights without remedies. Justice should not depend on the weight of the pocket book.

The argument is threefold: 1) To hold otherwise seriously undermines the Justice Department's efforts to enforce Section 5; (Jurisdictional Statement of the Justice Department p. 13) 2) The legislative history shows that the Senate intended this to be the case; (Jurisdictional Statement of the Justice Department p. 4) and 3) The Attorney General's regulations to this effect (28 C.F.R. Pt. 51, *et seq.*) should be given great deference. (Jurisdictional Statement of the Justice Department p. 14.)

1) *Enforcement of Section 5.* As the Trial Court correctly holds, this Court's decision in *Miller v. Johnson, supra,* disposes of this claim. (Trial Court Opinion, at pp. 20a-24a.) The Trial Court states that the Supreme Court in *Miller* held that

> [T]he manner in which the Attorney General had employed Section 5 of the Voting Rights Act was 'insupportable', and that the Attorney General's incorrect interpretation of Section 5 could not be a compelling state interest sufficient to survive strict scrutiny. (Trial Court Opinion at p. 20a, citing *Miller* at 2492.)

The District Court further points out that the *Miller* Court "noted that the purpose of Section 5 is to avoid retrogression in the position of minority voters, and stated that the 'Justice Department's maximization policy seems quite far removed from this purpose.' " (Trial Court Opinion at p. 21a, citing *Miller* at 2493.)

When the Justice Department denied preclearance in this case they were operating under the same "maximization" policy as the policy repudiated by this Court in *Miller*. As the Trial Court held,

> [D]efendant's argument that the School Board's adoption of the Police Jury plan rather than

> something like the NAACP plan runs afoul of Section 5 is indistinguishable from an argument rejected by the Court in *Miller v. Johnson*. Here, defendant argues that the School Board has failed to provide an adequate reason explaining why it declined to act on a proposal featuring two majority-black districts. The Supreme Court described this position as "insupportable" and stated that Georgia's adherence to "other districting principles instead of creating as many majority-minority districts as possible does not support an inference that the plan 'so discriminates on the basis of race or color as to violate the constitution,' and thus cannot provide any basis under Section 5 for the Justice Department's objection." (Trial Court Opinion at pp. 24a-35a, citing *Miller* at 2492, citations omitted.)

The Trial Court correctly followed this Court's holding in *Miller* and held that

> The key to defendant's position in this case, similarly, is that the School Board has not provided an adequate explantion for adopting the precleared Police Jury plan when it had before it the NAACP plan. As *Miller* makes clear, the adoption of one nonretrogressive plan rather than another nonretrogressive plan that contains more majority-black districts cannot by itself give rise to the inference of discriminatory purpose. . . . The *Miller* Court rejected this theory of Section 5, and we will not resuscitate it here. (Trial Court Opinion at pp. 35a-36a.)

Appellant's argument that the District Court's holding should be overturned because it impedes Justice Department efforts to enforce their *erroneous* interpretation of Section 5, is unavailing.

2) *Legislative History*. As the District Court concluded "We hold, as has every court that has considered the question, that a political subdivision that does not violate either the 'effect' or the 'purpose' prong of Section 5 cannot be denied preclearance because of an alleged Section 2 violation." (Trial Court Opinion at pp. 11a-12a.) Given the serious federalism concerns invoked by Section 5's "extraordinary procedure" of requiring federal preclearance of states' redistricting legislation (Trial Court Opinion at p. 13a); the different functions of the two sections (Trial Court Opinion at pp. 14a-15a); the difference in the allocation of the burden of proof between the two sections (Trial Court Opinion at p. 16a); and the unambiguity of the statutes (Trial Court Opinion at p. 17a); the Court below "would not be pursuaded that what little legislative history defendant has discovered is sufficient to justify the radical expansion of already significant encroachment on the prerogatives of States and their subdivisions." (Trial Court Opinion at p. 17a.)

3) *Deference to Attorney General's Regulation*. In response to the deference argument, the Trial Court pointed out "Wherever else the Attorney General's interpretations of Section 5 of the Voting Rights Act may be entitled to deference, it certainly is not in this court. We will not defer to the Attorney General where, under the statute, an action seeking preclearance may be brought here in the first instance." (Trial Court Opinion at p. 18a citing cases at 18a-19a.)

IV. The Trial Court Considered All Relevant Evidence in Determining Discriminatory Purpose Under Section 5 in This Case

The Trial Court majority correctly held that the Bossier Parish School Board Plan was entitled to preclearance because the plan does not have a discriminatory "effect" and was not adopted with a discriminatory "purpose" but rather was adopted for legitimate, nondiscriminatory reasons.

Appellants argue that even even if a Section 2 violation is no basis for denying preclearance under Section 5, evidence of such an alleged violation (i.e., of factors set forth in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 [1977]) should nonetheless be considered by the District Court in making a determination under the "purpose" prong of Section 5.

As this Court is aware, *Arlington Heights* is not a Section 5 case. The case articulates a much-used standard for evaluating "discriminatory purpose" in constitutional and Section 2 cases. As the Trial Court recognizes, however, this is not the appropriate standard for the "extraordinary procedure" called for under Section 5. The Trial Court's opinion makes clear its analysis of Section 5 and the jurisprudence leads it to the conclusion that the "federalism costs" of Section 5 put it in a different category from constitutional challenges under the Fourteenth and Fifteenth Amendments and Section 2 challenges. The Trial Court held:

> [T]he statutory language sets forth differing standards for the two sections. The line cannot be blurred by allowing a defendant to do indirectly what it cannot do directly. The federalism costs already exacted by Section 5 are seriously

> increased if, under the guise of "purpose" evidence, alleged Section 2 violations must be countered by the political subdivision whenever it seeks preclearance. (Trial Court Opinion at 21a, n.10, 23a.)

Instead, the District Court correctly formulated and utilized the proper "purpose" analysis in a Section 5 proceeding. The Court held that the plaintiff (here the School Board) bears the burden of proving that it did not adopt the Police Jury plan with a discriminatory purpose. (Trial Court Opinion at 24a, citing *Rome v. United States*, 446 U.S. 156, 183 (1980).) The Court goes on to note that "[H]ow this plays itself out in litigation has been left largely unexplored. But a burden of proving non-discrimination on the plaintiff is anomalous under our law; the plaintiff is put in the position of proving a negative." (Trial Court Opinion at 25a.)

The District Court held that

> [O]nce the Board makes out its *prima facie* case, it is entitled to preclearance unless its *prima facie* case is rebutted. . . . If, however, the School Board's evidence is more persuasive than the evidence proffered against it, the School Board is entitled to preclearance. To make out a *prima facie* case for preclearance, the School Board must demonstrate that the proposed change will have no retrogressive effect, and that the change was undertaken without a discriminatory purpose. Proof of nondiscriminatory purpose must include "legitimate reasons" for settling on the given change. (Trial Court Opinion at pp. 26a-27a, cases omitted here.)

The District Court followed a co-equal panel in this analysis. (Trial Court Opinion at p. 27 a, n.14, citing *New York v. United States*, 874 F. Supp. 394, at 400 (D.D.C, 1994).)

Both the Justice Department and George Price, et al. claim that the evidence of discriminatory purpose presented at trial was probative of the School Board's discriminatory purpose. (Jurisdictional Statement of the Justice Department at p. 15 and Jurisdictional Statement of George Price, et al. at p. 2.)

Even though the Trial Court decided that much of this evidence was not relevant to a Section 5 action (Trial Court Opinion at p. 9a n.6), it may be helpful to elaborate for this Court on the nature of some of the evidence that the Appellants claim the Court below ignored.

The Justice Department and George Price, et al. claim that "The white Police Jurors and their demographer knew, just as the School Board knew during its subsequent redistricting process, that it was feasible to create two reasonably compact black-majority districts." (Jurisdictional Statement of the Justice Department at p. 8, citing Stipulations. 76a #36, 82a-83a #53, 114a #148 and Jurisdictional Statement of George Price, et al. at p. 5.) The referenced stipulations read as follows:

> **#36**: At the time of the 1990-91 redistricting process, some *Police Jurors* were specifically aware that a contiguous black-majority district could be drawn both in northern Bossier Parish and in Bossier City. At the time of the 1990-91 redistricting process, it was obvious that a reasonably compact black majority district could be drawn within Bossier City. "Contiguous" here means that all units of geography in the district have some common border with some adjacent unit." [emphasis added]

#53: At the April 25, 1991 Bossier Parish *Police Jury* meeting, Gary Joiner presented three plans to the *Police Jury*. These alternative plans drawn by Joiner were called Plan 5, Plan 8, and Plan 9. A number of members of the black community attended and asked about the creation of a black-majority district. Joiner stated that the wide distribution of blacks in the parish made a black-majority district "statistically impossible." At deposition, Joiner acknowedged that he knew at that time that drawing two black-majority districts within Bossier Parish was "statistically" possible, in that you could create two majority-black districts at a census block level with the correct population, ignoring precinct considerations. [emphasis added]

#148: The northern parish minority district in the Cooper Plan, District 8, is similar in shape and location to District 2 of the NAACP Plan, but is less elongated and more compact. The two are sufficiently similar so that the possibility of creating a district like the Cooper District 8 was readily discernible. However, Cooper District 8 is shorter and more compact.

Where in this "evidence" (which Appellants claim was "ignored" by the Court) is proof that a majority of the *School Board* members knew during their subsequent redistricting process that it was feasible to create two reasonably compact black districts? The evidence clearly shows that they were told by both the demographer and the District Attorney (the two persons upon whose opinons they would most likely and most reasonably rely) that in fact they could not draw the majority black districts in the NAACP plan without violating state law and without violating traditional districting principles. (Tr. Vol. I, pp. 48-49, 108-109, 143, 148.)

The Trial Court pointed out that Defendant and Intervenors below

> contend that the Police Jury plan itself was precleared by the Attorney General only because relevant information was withheld from the Attorney General. In order for this to be evidence that the School Board adopted the Police Jury plan with an impermissible purpose, the School Board would have to have known that such information had been withheld from the Attorney General, and that but for that withholding, the Attorney General would not have precleared the Police Jury plan. We know of no evidence even suggesting the School Board had any knowledge that the Police Jury plan had been precleared illegitimately if in fact it had been. (App. 28a-29a.)

The Trial Court did not *ignore* evidence "that the School Board knew during their subsequent redistricting process that it was feasible to create two reasonably compact black districts". There was no such evidence to be ignored.

As the Trial Court correctly recognized, the fact that the School Board originally did not like the Police Jury plan (because it pit incumbents against each other and did not include schools in every district), argues not for their willingness to subvert these concerns to their discriminatory purpose, but rather the importance they placed on the legitimate purposes, i.e., "guaranteed preclearance" and "easy implementation." (Trial Court Opinion at p. 28a.) As the Trial Court said,

> The Police Jury plan wreaked havoc with the incumbencies of four of the School Board members and was not drawn with school locations in

mind. When, however, the redistricting process began to cause agitation within the black community, and when it became obvious that any plan adopted by the School Board would give rise to controversy and division (and we find that by the time the NAACP's redistricting plan had been presented to the School Board, the Board could very reasonably foresee this), the Police Jury plan became, as Board member Myrick described it, 'expedient.' Any port will do in a storm, and when the clouds over the School Board's redistricting process began to grow ominous, the only close port was the already precleared Police Jury plan." (Trial Court Opinion at p. 28a.)

Appellants make much of statements made by three School Board members as evidence of discriminatory purpose. (Jurisdictional Statement of George Price, et al. at pp. 10-11 and Trial Court Opinion at p. 30a.) The Trial Court found this evidence unconvincing, as did the dissenting judge. (Trial Court Opinion at pp. 30a-32a and 32a n.17.) And this was, by their own assertion, the "best evidence of discriminatory purpose" put forward by counsel for Intervenors below. (Trial Court Opinion at p. 32a n.17.) The Trial Court majority found that this evidence constituted the "direct" evidence presented by Defendant and Intervenors [Appellants here] and consisted of the alleged statements of three School Board members. The Trial Court concluded that "none of these statements attributed to these Board members, if they were in fact made, show that the Board acted with discriminatory motivation." (Trial Court Opinion at p. 30a.) The dissenting judge found "These statements standing alone would certainly be insufficient to show discriminatory purpose." (Trial Court Opinion at p. 32a n.17.)

The majority in the Trial Court below then discusses the "indirect" evidence. The Court found that the evidence that "defendant relies most heavily upon is the 'sequence of events leading to the school board's adoption of the police jury plan.' " (Trial Court Opinion at p. 33a, citing Defendant's Brief at p.15.) The Trial Court says that "Defendant argues that these events raise an inference that the plan was adopted with a discriminatory purpose." (Trial Court Opinion at p. 33a.) The Court, however, rejects this argument, holding

> [W]e think that assuming that the quick rejection of the NAACP plan is probative of a discriminatory purpose requires at least that the Board have regarded the NAACP plan as a plausible plan. We have no evidence that the plan was, as an objective matter, plausible. . . . And, we have no indication that the School Board itself thought the plan plausible. The existence of the NAACP plan demonstrated to the Board that its efforts to redistrict would be subject to exacting review and vociferous criticism. The swift selection of the only plan around that bore the imprimatur of the Attorney General resembles not a brazen stroke in the name of racist redistricting but an understandable, if not necessarily laudable, retreat from a protracted and highly charged public battle. (Trial Court Opinion at pp. 33a-34a.)

Thus, as the Trial Court found, there is insufficient evidence in the record which is relevant to a Section 5 inquiry to rebut the School Board's *prima facie* case that it adopted the precleared Police Jury plan for legitimate, nondiscriminatory reasons and the judgment of the Trial Court should be affirmed.

V. Appellants' Redistricting Plan Is Neither Appropriate Nor Constitutional

Despite Appellants' assertion to the contrary, the redistricting plan they sponsored as an alternative is neither appropriate nor constitutional. It is not appropriate because it fashions two bizarre and outrageously gerrymandered black majority districts solely for racial considerations. We have already mentioned that the NAACP plan split some forty-six precincts. (Even Creel, their witness on splitting precincts, testified that the most he had seen split was eight.) The final Cooper plan split twenty-four precincts by Cooper's own account. (Tr., Vol. II at pp. 176-177.) In the District Court for the Middle District of Louisiana, the first plan devised by Appellants' cartographer, Mr. William Cooper, was put forward to the Court in a suit brought by certain black Bossier Parish residents as a proper alternative to the Bossier Plan.[7]

The final Cooper plan was a most unimpressive effort. Mr. Cooper obligingly told us that he prepared this plan to fashion two black-majority districts. He admitted to Judge Richey that his districts were not compact; when he was asked by the Court if compactness was important,

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[7] This suit was entitled *Rev. Jesse Carroll Knight, Sr. et al. v. W. Fox McKeithen, Secretary of State*, No. 94-848-A-2, in the United States District Court for the Middle District of Louisiana, Judge John Y. Parker, presiding. Judge Parker characterized the Cooper plan as an octopus with tentacles in all directions. See copy of Judge Parker's comments into the record at the end of the trial in the *Knight* case which forms an exhibit in this case. (See Complainant's Exhibit No. 9.) Judge Parker refused to install Mr. Cooper's plan. The second Cooper plan advanced by Defendant/Intervenors in this case was the same plan as in *Knight* with very insignificant alterations.

he assured Judge Richey that compactness was of no real significance. That is news to us and appeared to be news to the Court as well. (See Tr., Vol. II at pp. 178 *et seq.*)

But if we read *Miller v. Johnson* correctly, the Cooper plan would also be unconstitutional. The majority opinion in the *Miller* case squarely held that Section 5 of the Act did not require maximization of black-majority districts, and, indeed, to fashion districts solely or substantially for racial purposes is a violation of the Equal Protection clause of the Fourteenth Amendment. See *Miller v. Johnson*, 115 S.Ct. at 2493. The *Miller* case made it crystal clear that the Voting Rights Act was intended to prevent retrogression and did not mandate a policy of maximization of black-majority districts so vigorously and uncompromisingly advanced by the Justice Department.

Were this court to invalidate the judgment of the Trial Court, the Bossier Parish School Board would be in a dilemma from which there is no escape. Left to the tender mercies of the Justice Department, it would no doubt be compelled to disobey Louisiana law and install the Cooper plan, the octopus with tentacles in all directions, as Judge Parker so wryly put it. If challenged by white voters, the Board would be compelled to testify that the gerrymandered districts were fashioned for racial reasons only, or perjure themselves and pretend that the bizarre districts were fashioned for reasons other than race. If the Board opted to tell the truth, the plan would clearly be a violation of the Equal Protection clause as *Miller v. Johnson* points out.

VI. The Long Run Consequences

Appellants' interpretations of the Voting Rights Act bear small resemblance to its purposes. To be sure, it was enacted to effect equality in the electoral process, to correct past abuses, to guarantee black voting registration and to promote it, and to put a stop to gerrymandering to dilute black voting strength. The task of administering the Act was entrusted to the Voting Rights Section of the Civil Rights Division of the Department of Justice. The personnel of that section set about their task with fervor and, at times, a vengeance. It was not long before white gerrymandering ceased and impediments to black registration, or even discourtesies in the process, triggered the intervention of federal enforcement agencies. Perhaps Justice Clarence Thomas put it best in *Holder v. Hall,* 114 S.Ct. 2581, 2612 (1994) when he chided the *Thornberg v. Gingles* Court for studiously ignoring the Dole Amendment of 1982: "We have stated time and again that a legislature says in a statute what it means and means in statutes what it says."

"Power corrupts and absolute power corrupts absolutely," commented Lord Acton. Lord Acton's dictum is nowhere more evident than when the Justice Department wields its enormous powers. The Voting Rights Section, burgeoned with young, exuberant social engineers, convinced that they possess a monopoly on virtue, determined to create in its subject territories its own brand of electoral justice. Justice Thomas in *Holder v. Hall,* 114 S.Ct. 2581, 2599 (1994) captured this attitude when he sharply scored the Justice Department personnel for imposing their will on political entities who want only "to avoid costly and disruptive Voting Rights Act litigation," all aided by some federal courts. The opinion of Judge Wiener in *Hays v. Louisiana,* 839 F.Supp. 1188, fn. 21 at

pp. 1196, 1197 (W.D. La. 1994) also was critical of the machinations of Justice Department personnel, as was the Trial Court in *Miller v. Johnson,* 864 F.Supp. 1354, 1362 *et seq.* (S.D. Ga. 1994), to name but a few. Under the draconian program of the government, the wheel of logic has come full circle: blacks are equal to whites, but in Orwellian fashion, some are more equal than others. Gerrymandering in favor of blacks and Hispanics became the standard for the social engineers, the modern day *literati.*

In a few decades American historians will applaud a few of the intentions of the Justice Department and lament the unsavory consequences of its follies, its penchant for quick fixes, its abuse of the immense power it was granted. The historians will wonder how the courts turned blind eyes to a deliberate defiance of the Dole Amendment which so clearly states: "Provided, nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." (See 42 U.S.C., Sec. 1973, 2(6).)

This case, like *Miller v. Johnson, supra* (and countless others unlitigated and unknown to the courts and the public in general), illustrate beyond peradventure the scorn heaped on the Dole Amendment. The Justice Department demanded that the Bossier Parish School Board fashion two black-majority districts, not because proper demographic principles supported two, but because two safe black districts conformed roughly to the proportion of blacks to the population. This was the price for preclearance. In Georgia, the demand was for three black-majority districts because three was approximately the proportion of blacks to the state population. The redistricting plan that had two seats was not enough to please the *literati.* The black witnesses in this case all stated that they were entitled to two seats because two

conformed to their percentage of the population. If the Justice Department did not implant that notion, it certainly did nothing to disabuse its witnesses of it. The demand letters to the School Board from the Justice Department all specified two safe seats, never one.[8] (See Complainant's Exhibit No. 4.)

Historians may be unkind enough to point out that the scheme of emphasizing race, of pitting racial and ethnic groups against one another, of emphasizing differences rather than similarities, has promoted the very hostilities and distrust the Voting Rights Act was fashioned to remove. They might reflect that the creation of a new system of apartheid spelled an end to the American dream of unity, the Americanism that St. John Crevecoeur pridefully wrote about in the early years of our republic, of the pride we took in welcoming into our midst refugees from abroad and assimilating them into our society. The loss of this dream, a sense of national mission, cannot be quantified in a computer, but it is a heritage that makes our nation unique. It is not too much to say that we today are becoming a sharply divided nation stressing, as we do, the issue of race in matters such as affirmative action and electoral redistricting. If this Court

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[8] We are aware that a few courts state that the Justice Department's demand for safe seats reflective of the minority population does not constitute proportional representation. We concede that it certainly is not a pristine copy of the system invented by the Belgian, M. Dhont. But the Dole Amendment does not proscribe proportional representation as an electoral system, it proscribes creating districts with a view to electing protected minorities in numbers proportionate to the population. We challenge anyone to distinguish what the Justice Department demanded in Bossier Parish from the proscription contained in the Dole Amendment.

believes that we are paranoid about this, we suggest that others whose dedication to civil rights has never been challenged are also deeply troubled.[9] A nation cannot as official policy treat races and ethnic groups differently without itself becoming disunited. As the Trial Court pointed out in fn. 12 at p. 24a of its opinion:

> At closing argument, defendant's counsel was presented with the question of whether a school board that affirmatively decides not to take race into account in any way could be found to have violated section 5. Counsel stated that a school board with the history and context of the Bossier Parish School Board which declined to take race into account would indeed violate section 5. This strikes us as double counting. The reason the Bossier Parish School board is subject to Section 5 at all is, at least in part, because of its history and context. Now that it is subject to Section 5, defendant would again cite the School board's history as a reason to saddle it with the additional burden of affirmatively taking race into account in order to prove that it did not have the proscribed purpose.

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[9] See for example, Schlesinger, *The Disuniting of America*, Norton, 1991; Professor Lasch, *The Revolt of the Elites and the Betrayal of Democracy*, Norton, 1995; Sykes, *A Nation of Victims, The Decay of the American Character*, St. Martin Press, 1992; Hughes, *Culture of Complaint*, Warner Books, 1993; Sleeper, *The Closet of Strangers: Liberalism and the Politics of Race in New York*, 1990; and his excellent followup, "The End of the Rainbow," *New Republic*, November 1, 1993. These writers, and many other observers, concur in warning of recreating segregation by treating races differently.

The Court could have gone further. As the Justice Department fans conflict and hostility by arranging confrontation among the races and ethnic groups, and by its policies arranges for and even encourages bloc voting, it then uses the painful results of its misguided zeal as justification for its agenda to erase the very tragedies it has staged. The more apartheid crystalizes, the more the Justice Department can claim its program is indispensable to equality. And so on, *ad infinitum, ad nauseam*. It is a bureaucrāt's dream; a self-perpetuating program. It resembles a political commentary co-authored by George Orwell and Franz Kafka.

But what will distress future historians most is that this is one more example of the erosion of the right of plain, ordinary Americans to control their own destinies. Nothing is more precious to democracy than control of its electoral system; nothing erodes a democratic system more than the emergence of a clerisy, a modern day *literati* whose members believe with a certainty that is frightening that they are better and brighter than the rest of us, and that they, and only they, have the virtue and talents to qualify them to rig our election machinery to superintend who will be our Representatives in Congress and state legislatures, who will as judges preside over our system of justice, who will wield power as commissioners, councilmen, school board members and, indeed, the entire gambit of elected offices. Once again issues of substance have been wrested from the public realm and entrusted to an elite presumably to save us commoners from ourselves.[10]

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[10] Lewis Lapham, longtime editor of *Harpers* has charted this movement in *The Wish for Kings*, Grove Press, New York, 1993. In a recent appellate court opinion which by some logical

And yet, the record of America's majority is not really so bad. If Americans were agonizingly backward in our early treatment of dark-skinned peoples (and also Irish, Chinese, Japanese, Jews and slavic immigrants), who in the world was so majestically tolerant and compassionate? The Belgian King, Leopold II, whose myrmidons inflicted unspeakable atrocities on the Congolese? Or the European imperialists who uniformly mistreated Africans and Asians in the name of religion and civilization. Or Bostonians who in 1835 paraded the abolitionist William Lloyd Garrison through the streets with a rope around his neck? Or the mob in 1837 that murdered the abolitionist Elijah Lovejoy in Alton, Illinois? Or the mob of "respectable" citizens of Utica, New York in 1835 including at least one judge, a Congressman and a clergyman who cracked skulls in a rout of a small group of abolitionists who, according to all contemporaneous accounts, were merely minding their own business?

In the "Gilded Age" of the American Industrial Revolution, the much maligned common man persisted in

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tour de force found the right to die written in the Constitution, Judge Andrew Kleinfeld, in dissent noted: "The founding Fathers did not establish the United States as a democratic republic so that elected officials would decide trivia, while great questions would be decided by the judiciary." He might well have been restating Thomas Jefferson who wrote: "State a moral case to a ploughman and a professor, the former will decide it as well, and often better than the latter, because he has not been led astray by artificial rules." Reproduced at page 18 of Roberts and Stratton, *The New Color Line: How Quotas and Privilege Destroy Democracy*, Regnery Publishing, Inc., Washington D.C., 1995. It is embarrassing that most of the world's democracies exhibit a great deal more confidence in the people than do we.

electing state officials who recognized the need for reforms in the work place.

The majority concurred with Woodrow Wilson that Imperial Germany should not stand astride Europe in its jackboots and with Roosevelt, the charismatic patrician in a wheel chair and in his far-reaching reforms, despite the ferocious opposition of so many elites. Americans rejected both communism and fascism, unlike the Italians, Germans, Russians, Hungarians, Poles and the Yugoslavians, to name but a few.

The majority supported the war against fascism and showed extraordinary judgment and compassion in supporting policies that treated our conquered enemies with justice and dignity. The Marshall Plan, the most generous program in the history of the world, was supported whole-heartedly by a vast majority of the people.

And so on. History shows that when the majority seems slow to act, there is no shortage of elites to mount their offensives. As in keeping with Jefferson's belief, their record is not all that thrilling. It was the bureaucratic elite that supported a series of childish policies to assassinate Castro and mounted senseless interventions in Iran, Grenada, Guatamala, Nicaragua, Panama, Vietnam, and Chile, to name only a few. These were "covert" programs, covert for fear that Americans would learn of them and dismantle them. The targets of these policies always knew about them.

Do we waste the Court's time? Perhaps this Court is more interested in who testified to what, or the metrical embroideries the Justice Department employs in transmogrifying the Voting Rights Act into a convenient way to specify who our leaders will be. It is a heady power; small wonder that they fight to retain it. We respectfully

suggest that anyone who can reconcile himself to what the Justice Department is doing has misplaced his priorities. Nothing worse can befall us than to become a federation of races, a Balkan type republic where races and ethnic groups are taught hate and distrust, so tragically embodied among Muslims, Catholic Croatians, Orthodox Serbs, and Albanians. When hatred and distrust are institutionalized, as the Justice Department is on the road to doing, tolerance becomes ever so difficult to restore.[11]

We are not now and never will be free of prejudice. Loves and hatreds, however ugly, are prices we pay for democracy. Love and tolerance cannot be legislated. Resentment flourishes among a free people when an unelected elite herd them about like animals. The path toward unity is not legislation imposing a litany of dos and don'ts on a free people, but in education, social pressures, and programs that treat all people equally and fairly, and stress likenesses rather than differences. This approach has a much better chance of working. The gross anti-semitism of pre-World War II America has waned enormously without extraordinary legislation largely through education, social pressures, and the development of tolerance. In 1979 in *Orr v. Orr*, 440 U.S. 268, 99 S.Ct. 1102 (1979), this Court in a well reasoned decision decided that cosseting women had the unfortunate result of institutionalizing a belief in their inferiority. It argued that when we tell women they are inferior, we may soon become the architects of their inferiority. Today women in

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[11] The damage already done will persist well into the next century unless this Court restores some balance to the Voting Rights Act. When the census of the year 2000 is finalized, the outrageous and racially gerrymandered districts will have to be retained because Section 5, as the Justice Department reads it, prohibits any retrogression.

law, engineering, medicine, and business testify to the wisdom of that decision. If indeed, people respond better to challenges, why should this widely accepted psychological concept not be equally beneficial to racial and ethnic minorities as well as to women?

The people of Bossier Parish are not the clerisy. It is easy to dismiss them as "bumpkins", "rubes", and "rednecks." Nor is the School Board extraordinary; it consists of housewives, former teachers, local businessmen, a banker and a retired Chief Probation officer in the United State Court system. None is an Ivy League graduate. They take pride in what they do. They are not racists, nor do they claim to be saints. They became stubborn because they deeply resent being patronized at best and denominated "racists" at worst.[12] They have difficulty accepting that they cannot be trusted to do justice. In the election of March, 1996 which took place after the Board was given preclearance, a black was elected outright, and three others will vie for Board seats in the runoff scheduled for April 20, 1996. One black in the runoff got 41% of the vote to his white opponent's 34%; the black may well win that seat. In another race the black and white candidates in the runoff each got 39% of the vote. In the third runoff, the black lagged well behind the white. The outcome, however, may well place as many as three blacks on the Board. See Motion to Supplement the Record filed by Appellee. This election certainly offsets the gloomy testimony of Dr. Richard Engstrom who saw no way for

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[12] It is unfortunate that the designation of "racist" is no more meaningful in most instances than "communist" in the McCarthy era. Calling a person "racist" who does not agree one hundred per cent with one's agenda, is a ploy to place the target on the defensive and extract something from the leverage created.

blacks to be elected under the Board plan. Dr. Engstrom testified that in Bossier Parish there is a degree (unspecified) of racial bloc voting. Because there is a degree of racial bloc voting everywhere (as well as religious bloc voting, gender bloc voting, etc.) the Court appeared to believe that Dr. Engstrom had advanced mankind's knowledge very little. We concur.

The black who won outright ran against another black. He is Julien Darby, brother to Jerome Darby who twice in the 1980s won contested seats on the Police Jury in a white majority district and won an unopposed race in his new white-majority district created after the census. It is illuminating to read the direct testimony of the local NAACP President, Mr. George Price. In commenting on Jerome Darby's political success in three consecutive races, Price comes very near characterizing Jerome Darby as an "Uncle Tom" *because he has not made race an issue.* Never has it occurred to Mr. Price and the Justice Department that perhaps Bossier voters may well be tired of the racial issue and wish to dwell on ideas and performance.

When speaking of the elite bureaucrats in the Justice Department, some historian may recognize a parallel to the oft-quoted comment of Tacitus, defender of republicanism: "they have made a wilderness and called it peace." It is time to correct the imbalance, to give effect to the Equal Protection Clause, and to cease arranging racial confrontations. It would not be a travesty to deliver back to the people control of their electoral systems and the larger measure of democracy that would result. Perhaps this Court might say to the Justice Department what

Cromwell told Parliament: "You have sat too long for the good you have done. . . . In the name of God, go!"

CONCLUSION

For the reasons set forth above, the decision of the Trial Court should be affirmed.

Respectfully submitted,

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